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No. 87-1344

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

EDWIN MEESE III, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

JACK ABBOTT, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED

FEBRUARY 10, 1988

CERTIORARI GRANTED APRIL 25, 1988

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* The opinions of the district court and the court of appeals are printed in the appendices to the petition for a writ of certiorari and have not been reproduced.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

RELEVANT DOCKET ENTRIES

Date	Proceedings
5-29-73	Complaint, appearance filed.
12-5-73	ORDER denying motion of defts. to dismiss complaint. (Signed 12-5-73)
1-30-74	ANSWER by defts. to complaint.
3-4-74	MOTION by pltfs. for certification that this case may be maintained as a class action.
6-7-74	ORDER granting motion of pltfs. for certification as a class action, and directing that case not be maintained as a class action for determining damages.
4-14-78	MOTION of pltfs. to add party pltfs.
8-15-78	OPPOSITION of defts. to pltfs.' motion to add pltfs.
8-25-78	REPLY of pltfs. to defts.' opposition to motion to add party pltfs.
9-1-78	ORDER granting motion of pltfs. to add The Prisoners' Union, Weekly Guardian Associates, and The Revolutionary Socialist League as party pltfs. provided no additional pleadings be filed on account of the additions. (Signed 8-31-78)
6-15-79	MOTION of defts. to dismiss publisher pltfs. pursuant to Rule 12(b)(6); memo of points and authorities.
6-28-79	RESPONSE of pltfs. to defts.' motion to dismiss the publisher pltfs.

Date	Proceedings
6-29-79	REPLY of defts. to pltfs.' response to defts.' motion to dismiss the publisher pltfs.
8-10-79	MOTION by pltfs. to sever the damage claims and to stay proceedings relating to the damage claims.
10-23-79	ORDER filed 10-18-79 denying motion of defts. to dismiss publisher pltfs.; directing that individual damage claims be severed from Rule 23(b)(2) claims for injunctive relief; staying discovery proceedings relating to individual damage claims pending resolution of claims for injunctive relief; and various discovery orders.
5-18-81	MOTION by defts. to dismiss complaint argued and denied.
5-18-81	TRIAL by Court begun; continued until 5-19-81 at 9:30 a.m.
5-19-81	TRIAL by Court resumed; continued until 5-20-81 at 9:30 a.m.
5-20-81	TRIAL by Court resumed; continued until 5-21-81 at 9:30 a.m.
5-21-81	TRIAL by Court resumed; continued until 5-22-81 at 9:30 a.m.
5-22-81	TRIAL by Court resumed; continued until 5-26-81 at 1:45 p.m.
5-26-81	TRIAL by Court resumed; continued until 5-27-81 at 9:30 a.m.
5-27-81	TRIAL by Court resumed; continued until 5-28-81 at 9:30 a.m.
5-28-81	TRIAL by Court resumed; continued until 5-29-81 at 9:30 a.m.

Date	Proceedings
5-29-81	TRIAL by Court resumed; continued until 6-5-81 at 9:30 a.m.
6-5-81	TRIAL by Court resumed and concluded. Finding: taken under advisement. Counsel to submit findings of fact and conclusions of law within thirty (30) days after receipt of transcript.
9-13-84	MEMORANDUM OPINION. BRYANT, J.
9-13-84	ORDER directing that defts. and their agents and successors are permanently enjoined from enforcing or applying the regulations now published at 28 C.F.R. 540.13(a), 540.14(a)(2), 540.14(a)(6), and 540.14(a)(7); directing that in all other respects judgment is entered for the defts.
10-5-84	NOTICE OF APPEAL by pltfs. from Order entered 9-13-84.
10-10-84	PRELIMINARY RECORD transmitted to U.S. Court of Appeals.
11- 9-84	CROSS-NOTICE OF APPEAL by defts. from Order entered 9-13-84.
11-13-84	PRELIMINARY RECORD transmitted to U.S. Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELEVANT DOCKET ENTRIES

Date	Proceedings
10-18-84	Copy of notice of appeal and docket entries from Clerk, U.S. District Court for the District of Columbia.
1-23-86	ARGUED before Edwards, Ruth B. Ginsburg, Circuit Judges and Thomas E. Fairchild, Senior Circuit Judge, U.S. Court of Appeals for the 7th Circuit, sitting by designation.
7-28-87	Opinion for the Court filed by Senior Circuit Judge Fairchild.
7-28-87	Judgment by Court of Appeals that the judgment of the District Court appealed from in this case is hereby affirmed in part, reversed in part, and this case is remanded in accordance with the Opinion for the Court filed herein this date.
7-28-87	Mandate order.
7-28-87	Per Curiam order, sua sponte, that the Opinion for the Court filed by Senior Circuit Judge Fairchild on July 28, 1987 be, and hereby is amended at page five, seventh line from the bottom, by deleting the word "services" and inserting in lieu thereof the word "activities."
10-13-87	Per Curiam order denying appellees' petition for rehearing. Edwards and Ruth B. Ginsburg, Circuit Judges and Fairchild, Senior Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, sitting by designation.

Date	Proceedings
10-16-87	MANDATE ISSUED.
4-27-88	Certified copy of order from Clerk, U.S. Supreme Court, granting the petition for a writ of certiorari in S.C. No. 87-1344 on 4-25-88.

EXCERPTS OF TRIAL IN
ABBOTT, ET AL. v. RICHARDSON, ET AL.

WASHINGTON, D.C.
TUESDAY, MAY 19, 1981

* * * * *

[98]

PATRICK McMANUS

was called as a witness by the plaintiffs, and having been first duly sworn by the deputy clerk, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Q: Mr. McManus, what is your present position?

A: I am Secretary of Corrections, that is, Director of Corrections for the State of Kansas.

* * * * *

[147] Q You were describing earlier some of the causes of violence in prison. You mentioned gambling debts as one of them. Are there other causes of violence?

A There are a lot of causes of violence. Currently one that is plaguing nearly everyone is the whole issue of overcrowding, which aggravates the loss of privacy and the loss of an ability to withdraw from the general population into a space that is your own. I think this over a time creates a tremendous tension. And, again, as the prisons become more overcrowded, those kinds of tensions become greater.

I think homosexuality and some of the spin-offs from relationships certainly can be a cause for violence inside a prison.

* * * * *

[167] Q Are you familiar with the Bureau of Prisons rule, which we've called in this case the all-or-nothing rule?

A Yes, I am.

Q And what does that rule require?

A I think basically it says if any piece of a publication is objectionable, then the whole publication is to be kept out of the institution.

Q And do you have an opinion as to whether or not that serves any security interest?

A Well, I don't know that it serves a security interest. I think it's certainly an administrative convenience matter in that you don't have to snip the particularly offensive part out. And there may even be an issue about an inmate being more angry getting a document in that's been cut up than being told he's not going to get it at all.

I guess my solution would be that we give the inmate a choice. If he wants the piece cut out and receive the rest of the publication, then, fine. If he'd just as soon that we didn't mess with it, that would be fine also.

* * * * *

[208] Q Mr. McManus, do you have before you Plaintiffs' 17 and 18? Number 17 is the rejection letter about The Labyrinth, and Plaintiffs' 18 is the issue that was rejected.

A Yes.

Q Do you have those?

A Yes.

Q All right.

Now, in the rejection letter, Plaintiffs' 17, it states that it was rejected from Marion because "we believe the article entitled 'Medical Murder' would be detrimental to the good order and discipline of this institution.

"The basis for our decision is that this type of philosophy could guide inmates in this institution to situations which could cause themselves and other inmates problems with the medical staff."

Have you read the article entitled "Medical Murder"?

A. Yes, I have.

Q. And have you formed an opinion as to whether or [209] not you agree or disagree with that statement and whether the publication is a threat to security or discipline at an institution?

A. Well, again, I would fail to see where it would be a threat to security. Whether or not people reading that would get angry at medical staff and find themselves in conflict with medical staff is speculation, and a kind of a stretched speculation as far as I am concerned.

But in any case, I would not see the basis for keeping the publication out of the institution.

Q. And would you allow that into the maximum security institutions in Kansas?

A. Yes.

Q. Suppose the publication we are talking about was criticizing the medical practices at the Kansas penitentiary at Lansing. Would you allow it into the Lansing penitentiary?

A. Yes.

Q. [sic] As a matter of fact, we have an inmate publication, an in-house publication that routinely criticizes the medical center at the penitentiary.

Q. And have you had any untoward incidents as a result of the existence of that publication at the penitentiary?

A. None.

Q. And you said you have read some of the depositions in this case. Did you see any evidence from the

depositions [210] that any of the publications in this case presented any problem at any institution?

A. I could find none from the depositions that I read, some of which I have read completely and others which I have skimmed; but I found no indication that that kind of behavior resulted from the introduction of the publications.

Q. If I told you Mr. Norman Carlson, the Director of the Bureau, stated that he felt that the whole tenor of the publication tends to raise issues which may or may not be true; an inmate may tend to believe the article on the lack of medical attention causing murders of inmates, and that can stimulate actions which can cause problems, would that change your opinion?

A. No, it would not.

Q. Do you have before you *Hustler Magazine*, . . .

A. Yes.

Q. . . . marked as Plaintiffs' 19?

A. Yes.

Q. Have you had occasion to review that?

A. Yes.

Q. Can you state that that contains some fairly explicit sexual material?

A. Yes, it does.

Q. It contains material of a sadomasochistic nature?

A. Yes, it does.

[211] Q. Does it contain some material containing bestiality?

A. Yes, I believe it does.

Q. And would you exclude that publication from any of the maximum security penitentiaries in Kansas on security grounds?

A. No.

Q. Would you exclude it on any other grounds?

A. No.

Q. Is it available then to inmates in the Kansas system?

A. Yes, it is.

Q. If the evidence in this case were to show that *Hustler* Magazine has been excluded at Atlanta and Lewisburg but is sold in the commissary at the institution at Marion, what opinion would you form?

A. Well, the opinion that has come up before, and that is that either the policy is so vague as to be lacking in direction for a warden-making decision what to keep out; or, at the very least, that the warden trying to interpret the policy coming up with a quite contrary solution.

Q. Well, is there any basis, any distinction, between, let's say, the institution at Marion, which is a level VI, the maximum maximum-security institution in the Bureau of Prisons, and the institutions at Leavenworth and Lewisburg, which exclude some issues of *Hustler*—is there a distinction that makes any difference that would support those differences [212] in policies?

A. I cannot conceive of a difference in those institutions that would account for allowing it in one and not allowing it in the other.

Q. Suppose the chairman of the incoming publications committee at Marion who signs the rejection letters at that institution tried to explain the difference in the following way: that Marion has single cells and has a high staff-to-inmate ratio; whereas Atlanta has more freedom of movement and, therefore, needs more control of literature; Marion has more sophisticated inmates and they do not play the little games they play at other institutions.

THE COURT: Do what?

MR. NEY: He says that they don't play the little games they play at other institutions.

THE COURT: More sophisticated inmates?

MR. NEY: At Marion.

Therefore, he says, they could receive it at Marion, which is a higher security level than Atlanta.

BY MR. NEY:

Q. Does that make any sense to you?

A. It doesn't make any sense.

If anything, I suppose I have heard the argument made when you have higher-security level and higher-security people and more sophisticated, a word we love to use, that [213] we need more control.

I never quite heard the argument used to the contrary—that the more sophisticated the inmates, the less control we have over the publications.

I think that is really stretching for a reason. But as I say, I would find it inconceivable that there would be differences between one institution and another that would justify *Hustler* coming into one and not coming into the other. I don't know what those differences would be.

* * * * *

[216] THE COURT: Dr. Wolfgang said yesterday that many of the people in the penitentiaries have a limited repertoire of reactions to different things and they are very defensive, and that is one of the reasons why they find themselves in jail.

And then when they get in jail and they have got a lot of them packed tight, the situation which led to their being there becomes exacerbated to some extent.

Nor [sic], if this publication [NS Report, P. Ex. 21] is offensive to you, don't you think it probably would be more offensive and may lead to a more demonstrative reaction to somebody who is in a penitentiary where I understand racial strife is a real problem?

Now, I follow you, but it seems to me that unless somebody told me, unless somebody could give me a very, very good case, if I were running an institution and I had a fair

amount of strife in my institution, fights, that obviously had some racial overtones, I just would not like to have this in there.

I mean here we are. You have people out in the street, for instance. These people wanted to parade out [217] someplace in Illinois and had a permit to do it. And the townspeople almost had to call—they called the National Guard out to keep order; and those people are free.

THE WITNESS: Yes.

THE COURT: Now, how do you account for it?

THE WITNESS: Well, if there is a publication that I would want to hinge [sic] my bet on, this is the one or this kind. And let me explain the reason.

I am still not sure that the presence of a publication like this in and of itself is going to alter behavior.

I think if there is a case somewhere where the tensions in a prison are apparent, it is along racial lines.

THE COURT: Sure, I mean if you have got a fire,

THE WITNESS: This panders to and capitalizes on that hatred and viciousness.

THE COURT: Sure it does.

THE WITNESS: So in my judgment—and, again, I can't prove this; so I suppose this is a weakness; I shouldn't say this, but I am going to say it anyway because I think it's true—in my judgment, this kind of interracial agitation, which is frankly what this is, both in terms of the people who subscribe to this philosophy as well as those who are obviously the victims of it or the opponents of it, in either hand it would tend to generate.

Perhaps in the hands of blacks and Jews and other [218] groups that this Nazi Organization was after, the danger in the prison may well be more than—it would in their hands and they would begin to feel the full wrath of the vengeance that this thing reeks of.

THE COURT: Here you have got a demonstration and somebody parades down in North Carolina, and five or six people end up getting killed.

THE WITNESS: Yes.

THE COURT: It seems to me that if the fires of animosity are smouldering, no matter to what extent they are subdued, this would be like throwing three or four gallons of kerosene on a fire.

THE WITNESS: As I mentioned, our practice with this particular one is to scrutinize it very carefully and be very careful with the content of it.

I agree with you that this is—of all the publications that we have looked at, not this particular one, I suppose, but that particular ilk, which not only advocates something unpopular or not only advocates organization of inmates—not only advocates things, but advocates a kind of racist vengeance—and it is not just a question of anger and hostility, as I think is the case of some of the other publications that we talked about—they were even more descriptive of reality and more venting of that feeling and that anger and that hostility.

* * * * *

WASHINGTON, D. C.
WEDNESDAY, MAY 20, 1981

* * * * *

[329]

JOHN CONRAD

was called as a witness by the plaintiffs, and having been first duly sworn by the deputy clerk, was examined and testified as follows:

* * * * *

[330] DIRECT EXAMINATION

* * * * *

Q: Mr. Conrad, could you describe your present position?

A: I'm employed by the American Justice Institute in Sacramento, California.

Q: And what kind of work do you do there?

A: Research and some training.

* * * * *

[356] Q. What are the other causes of violence [in prisons]?

A. Unquestionably sex is a problem in a prison. The frustrations of control and the frustrations of the absence of the opposite sex creates violence.

The prevailing level of homosexual activity, which varies from institution to institution and varies from culture to culture, is a source of violence.

In many state prisons—I don't think this is a problem as yet in the Federal Bureau of Prisons—there's a tremendous amount of violence that is generated by ethnic hostilities and by ethnic gangs.

Problems brought about by gambling and prisoner predation on each other is a constant source of violence.

I think I've covered some of the major causes.

* * * * *

[398] Q. I'd like to show you some publications which have been excluded from the Bureau of Prisons and obtain your opinions about them. I'll first ask you to focus on what's been marked as Plaintiffs' 29, *While There Is A Soul In Prison*, called *The 1979 Peace Calendar*.

Your Honor, do you have a copy?

THE COURT: No.

(Mr. Ney passing up a copy to the court.)

BY MR. NEY:

Q. The rejection letter for that publication is contained in Plaintiffs' 28. And I'll just read to you the reason for the rejection from Atlanta on October 6, 1978.

It states: "This publication has been determined to present a danger to the discipline, good order and security of this institution since it encourages prison strikes." And have you had a chance to examine that publication?

A. Not in detail. I don't recall that it encourages prison strikes. The letter which is before me here does [399] not say which item in here does encourage prison strikes.

Q. I'm going to show you certain portions of it which you were shown previous to this testimony and ask you if you've read those pages.

For the record, I would indicate that the witness was shown the page opposite the entry for March 19 through 25, and the following page, which is opposite March 26 through April 1, the page following, April 2 through 8, and the following page next to April 9 through 15, the page opposite May 21 through 27, May 28 through June 3, the page opposite June 4 through 10, June 11 through June 17, June 18th through 24, July 23 through 29, July 30 through August 5, August 6 through August 12, October 8 through October 14, and October 15 through October 21. Are those the portions that you examined, Mr. Conrad?

A. I've not examined all of this, Mr. Ney. I hesitate [sic] to testify in any detail about them.

Q. What about the portions that I've just listed.

A. I haven't examined all of the portions you've just listed there, however, those that I have examined are rather poetic statements about the hardships and the

deprivations in prison and encouraging inmates to assert their humanity in spite of the deprivations which they are exposed to.

I see no reason why this kind of publication should be excluded. I doubt very much whether it would be widely [400] read in any institution. And most of it is in very highfalutin language and very remote from the concerns of an inmate at Atlanta.

For example, the sufferings of a woman suffragette in a British Prison in 1909 are hardly the sufferings which an Atlanta prisoner would be subjected to or could relate to.

Q. And are you, therefore, saying that this publication does not present a threat to Atlanta?

A. No, it's sort of poetic grumbling, I think, which might have the advantage of being grumbling of a more elevated nature than ordinarily occurs in prison, but Atlanta is a big strong maximum-security institution and hardly needs that kind of protection from a publication of this kind.

Q. Do you see this being a treat [sic] to any prison within the Federal Bureau of Prisons?

A. No, I don't. I really don't.

* * * * *

[405] Have you had a chance to review *Hustler Magazine*, Plaintiffs' 35?

A. I'm afraid I have, Mr. Ney.

Q. And do you have an opinion as to whether that publication constitutes a threat to security, good order or discipline of any institution in the Bureau of Prisons?

A. It's a very repellent publication and I don't like it, But I can't think of any reason for excluding it which would not exclude a great many more legitimate magazines. I don't see that it threatens the security of the

institution, or is likely to corrupt the morals of those who read it any worse than they're corrupted already.

Q. Does that publication, to your knowledge, contain some depictions of bestiality?

A. What?

Q. Does it contain some bestiality—depictions of bestiality?

A. It seems to depict an act of bestiality. It's a little unclear as to whether it really does, but I take it that it does.

Q. I'm talking in particular about page 27.

A. Yes. I think it's a very unpleasant and disgusting pictures [sic], but I see no very good reason to exclude it which wouldn't apply to more legitimate magazines.

[405A] Q. I want to show you *Playboy Magazine*, Plaintiffs' number 36. Have you had a chance to look at that?

A. Yes, I saw that.

Q. And did the *Playboy Magazine* on pages 145 and 146 contain depictions of sadomasochism?

A. Well, I guess that's the best description of it. Sadomasochism.

Q. And did you find those to be a basis for rejecting that publication as a threat to the security of a Bureau of Prisons institution?

A. I have a special reason for feeling that sadomasochism is on the questionable list, which I previously discussed—is a questionable practice—a questionable kind of publication to admit. It has nothing to do with the security of the institution. It has the capability of encouraging future felonious sexual activity, which sadomasochism does lead to.

I think it's very unlikely that the kind of sadomasochism depicted in *Playboy* or some of the other journals I've seen can be successfully practiced in prison, the conditions of

privacy being what they are and the conditions of control being also what they are.

But I think it's objectionable for a public institution to disseminate or legitimate in any way publications which can tend to lead to felonious behavior after release.

[405B] I think this is the case with two kinds of sexual publications, the sadomasochistic publications —

THE COURT: Let me see what you're talking about. (Passing to the court.)

THE WITNESS: I don't think this is nearly as serious as some of them. The sadomasochistic publications and the publications showing child pornography—both of those, I think, have felonious implications, certainly in the case of child pornography and in general, I think, in the case of sadomasochism. And *I think the Bureau is well advised to be very conservative about admission of such publications.*

BY MR. NEY:

Q. Are you aware that the Bureau sells *Playboy* in the commissaries of virtually all of its institutions and that *Hustler Magazine* is sold in a number of institutions?

A. Yes, I know that. And I suppose that those journals being what they are and the possibility of those two particular kinds of articles being admitted in or published in those journals, it would be well for someone in the institution to see what's in them before they're distributed.

I think this is particularly the case in the case of *Hustler*, but I'm a little surprised to have found that article in *Playboy*, which I had understood does not feature that kind of material.

* * * * *

[410] ALLYN SIELAFF, ESQ.,

called as a witness by the plaintiffs, after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q. Mr. Sielaff, what is your current position and profession?

A. I am an attorney in private practice. I am also a director of criminal justice studies at a small college in Northeastern Ohio, Lake Erie College.

* * * * *

[441] THE COURT: I suppose that in some of these institutions that you have supervised, unfortunately for all of us, some of our problems in the street are transported into the institution.

And it is my understanding that a great deal of conflict—well, at least some amount of conflict—in institutions has obvious racial overtones.

THE WITNESS: Yes, sir.

THE COURT: This is a problem, I understand, throughout the system. Now, is that so?

THE WITNESS: That is definitely so.

THE COURT: All right.

Well, now, there is a publication around here. . .

THE COURT: Where is that publication you had yesterday that was a Neo Nazi publication?

MR. NEY: I am sure it is up here, Your Honor.

[Mr. Ney and the Deputy Clerk look for the exhibit in question.]

[442] [The publication is handed to the court.]

THE DEPUTY CLERK: Plaintiffs' number 21.

THE COURT: Have you ever seen this publication?

[The exhibit is handed to the witness.]

THE WITNESS: Yes, I have, Your Honor.

THE COURT: Where?

THE WITNESS: I think it is a publication that Mr. Ney had furnished me, and I have seen a lot of Neo Nazi publications, if not this one, like it.

THE COURT: If you were a warden at a penitentiary and you had this kind of trouble I am talking about, would you let that in your institution?

THE WITNESS: All right.

I think I would answer your question this way: that normally this kind of publication or those like it representing other extremist points of view are not going to cause a problem.

Where you do have a great deal of racial conflict, then if I were a warden, I would like to have the opportunity to exercise my discretion on an exceptional basis and have this excluded.

THE COURT: All right.

THE WITNESS: But as repulsive as this is to me and to others, in many institutions this simply is not going to cause a problem, given the set of facts that you have racial conflict.

[443] You know, at that point, I think that I would like to be able to exercise my discretion as a warden.

THE COURT: If you have a particularly tense situation?

THE WITNESS: Yes, sir; yes, sir.

And I can think of one that we had in Illinois, Menard, where we had members of the Chicago street gangs. This is an institute in the southern part of Illinois. There were members of Chicago street gangs, Neo Nazis and Klansmen, whites in southern Illinois—all in the same institution and rather balanced in terms of numbers.

Now, that is a potentially incendiary kind of a situation. That is where I think a warden ought to be able to exercise some discretion and exclude something like this or the KKK-type publication.

But in many institutions where there is sufficient harmony, people who subscribe to this are in the minority and, as a result of peer pressure, really nothing is going to happen.

THE COURT: All right.

BY MR. NEY:

Q. Has this publication or the *N-S Report* or something similar come into institutions when you were in Illinois?

A. Yes.

Q. And to your knowledge, it did not cause any problem?

[444] A. Yes, to my knowledge, it did not.

Also to my knowledge, I believe we had on occasion, given the kind of situation that the judge characterized and given my recollection of Menard, exercised some discretion in excluding publications as well.

* * * * *

[446] Q. And do you see any security threat posed by *Hustler* magazine?

A. I do not see any security threat, nor do I know of any security threat posed by *Hustler* magazine.

Q. All right.

Do you understand any rationale that the Bureau of Prisons would have for selling *Hustler* Magazine at Marion and excluding other issues at other institutions?

A. No, that would be very difficult for me to comprehend.

Q. Some of the Bureau people claim that they have more sophisticated kind of inmates at Marion than at . . .

A. I do not see that as [a] legitimate rationale.

* * * * *

[449] THE COURT: Well, do prison administrators believe that prison homosexual activity in institutions is a breeding ground for violence and . . .

THE WITNESS: No question about that being true, Your Honor.

* * * * *

CROSS-EXAMINATION

[485] Q. Other than the Neo Nazi materials that you might reject at an institution with heightened tensions, are there any other publications that you believe are appropriately rejected from an institution?

A. Well, child pornography material.

Q. Does that present a security problem?

A. I don't think it presents a security problem. I think it may be illegal. If it is not illegal, it's objectionable on other bases.

But I must confess that would be apart from security; it would be more on personal grounds.

[Pause]

THE WITNESS: I think, you know, one might justify it on security, I suppose, because we know that child molesters, for example, are, generally speaking, those who are held in greatest disrepute among inmates themselves. And that kind of identification might very well cause a security risk to be presented.

[486] I think one might make that kind of an argument; but, certainly, I would find some other argument to exclude that.

Q. What do you mean by "identification argument"?

A. I think that in the case of individuals who are child molesters and who do not go around institutions flaunting that they are child molesters—and I think probably you are going to the homosexual identification theory.

My point of view is that as far as homosexuals are concerned, on the one hand, they identify themselves.

Child molesters may not overtly identify themselves, and there might be a greater opportunity for that happening if they were to receive this material.

In other words, there might be that line of argument that could be used from a security standpoint, child molesters, being looked down upon as the lowest rung on the ladder among criminals, receiving that material.

Q. You say it could be used to identify child molesters, but it would not be used to identify homosexuals?

A. I don't think so.

Again, based upon my experience, homosexuals just identify themselves through overt kinds of characteristics we've talked about today, verbally, and otherwise. They really don't need any form of identification.

Q. Are there any closet homosexuals in prison?

[487] A. I suppose so. There are also people who did not practice homosexuality on the outside; but when they got in the prison environment under pressure, practiced homosexuality.

Q. What do you mean "pressure"?

A. Well, it is well known that there are wolves in any population in a prison, those inmates who are stronger and tend to prey on others who are weaker.

And sometimes, from a standpoint of just exerting power—although sex is involved, there seems to be more of a power kind of thing. They're wolves.

And others who are weaker, regardless of whether they practiced homosexuality on the outside, may very well be subjected to that kind of sex activity because of that prison circumstance.

Q. How would you identify the weaker inmate?

A. How would I?

Q. How could the weaker inmate be identified?

A. Just by stature, by physical appearance; a stronger, more powerful, individual might exert influence on that individual that causes or may cause a homosexual relationship to occur.

Q. Could that inmate be identified by virtue of the fact that he had secreted a homosexual publication?

A. Okay.

He could but I really think that is far-fetched.

* * * * *

[502] Q. Let me ask you to look at the front page of that publication [*The Torch*, P. Ex. 37]

A. (Complying) Yes.

Q. It speaks to or the headline is "United to Smash the Nazis and the KKK."

Would that article cause you to reject the publication?

A. No.

Q. Would it cause you to reject the publication at Menard where you had the gangs, Neo Nazi and Ku Klux Klan gangs?

A. Well, this is not—you know, this is not a paper that's identified with race; and so we were dealing with a racial situation.

And this is a socialist newspaper or a newspaper which espouses socialism.

I guess I would—that would be that one exceptional area where something like this would need to be evaluated.

And depending upon the facts in that given hypothetical, that is where you might want to make an exception or allow [503] the warden the discretion of recommending to the director an exception to be made.

But I just can't sit here in a blanket way and say yes or no, really, to your question.

Q. But you can say that the warden at Menard should have the discretion to decide whether or not this article relating to the Nazis and the Ku Klux Klan should be rejected?

A. No, I don't believe that the warden should have the entire discretion.

I think that he should have the discretion of making a recommendation so that it is subject to review.

A paper like this in an institution other than one that has the racial conflict that we spoke of as a hypothetical constitutes no security problem.

In fact, few inmates care about this stuff; most of it is boring after a time; and it certainly has nothing to do with security.

Given our hypothetical, the warden ought to be able to have the discretion to evaluate this, however, in a racially tense situation and communicate to the director or somebody higher up as an exception being made in excluding it.

That is what I believe the process ought to be.

Q. So you can envision some circumstances, maybe Menard where there is a Ku Klux Klan and Neo Nazi, that this publication might be rejected?

[504] A. I can envision through my own experience one circumstance where, yes, this might be rejected.

* * * * *

WASHINGTON, D.C.
THURSDAY, MAY 21, 1981

* * * * *

[518] JOHN CONRAD

resumed the witness stand, and having been previously duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

* * * * *

[546] Q. I direct your attention to paragraph #3-B on page #1. In particular I would ask you to read the second sentence.

A. #3-A?

Q. #3-B.

A. #3-B.

The second sentence says: "The warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant. Publications which may be rejected —"

[547] Q. Just the second sentence.

A. Okay.

Q. Do you understand that although the warden has discretion to reject certain publications, this sentence is a prohibition against him rejecting publications solely because the content is religious, philosophical, political, social or sexual?

A. Yes. The word "solely" is the operative word there. He can't reject, let's say, the Hustler Magazine because it is repugnant and has a sexual motive. He has to find something else in the Hustler that would be contrary to good order.

Q. Do you think that is a useful limitation on his discretion?

A. Well, my position, Mr. Dutterer, is that publications have — from a vast amount of experience that has accumulated in operating correctional institutions — publications have very little influence, if any, in actions prejudicial to discipline. And, consequently, I would prefer to have a very limited list of prohibitions. Prohibitions of literature having to do with the construction of weapons I think is an obvious exception.

My opinion is that if I were a warden or the Director of the Bureau of Prisons I would prefer to prohibit any literature having to do with child pornography or sado-masochism because [548] that is felonious behavior and should not be circulated in an inmate body. It shouldn't be

circulated anywhere, in my opinion, but certainly not in an inmate body.

Q. What are some of the difficulties of circulating that type of material in an inmate body?

A. I think it creates an insoluble conflict, which I don't think the warden should be subjected to. The conflict is simply this: He is putting himself in a position of saying that here is sado-masochistic literature or child pornography or something like that, you can read it, and it doesn't make any difference to me. Well, it does make a difference. This is literature that encourages behavior which in most states is felonious.

Q. Would that give the inmate the impression that the Bureau or the Warden was approving of that type of activity?

A. It would give the impression that the warden is indifferent at least to the circulation, indifferent to that type of activity.

I said this is my position. I think there are quite a number of people that disagree with me about it.

Q. Well, couldn't the same thing be said if a warden permitted in a neo-Nazi publication?

A. I would prefer to keep neo-Nazi publications and Ku Klux Klan publications out of the institution too. But on a somewhat different ground, however.

[549] Q. What is that ground?

A. In that area I take this position, Mr. Dutterer: that that kind of literature is offensive to a very large number, sometimes the majority of the inmates in an institution. For example, the Ku Klux Klan, which is highly offensive to black inmates. It is a needless affront to black inmates to allow the literature to circulate in the institution and I see no reason why it should be. It also brings into disrepute, I think, a reputation of the Bureau for fair deal-

ing with minorities. And if I were Director Carlson I would refuse to admit that kind of material or allow that kind of material to be admitted in any institution.

Q. So, there is some material—

THE COURT: Let me ask you this: Do you think it might have a negative effect on the security of the institution?

THE WITNESS: It might conceivably. I would have to say I don't know of any case where it has. But I would imagine that the free circulation of the Ku Klux Klan literature, for example, some of the literature I have seen in preparation for this testimony, would be sufficiently inflammatory so that there might be some problems with it.

However, in saying that I have to add that I have never heard of a situation in which that kind of literature has caused a prison riot or prison disorder.

* * * * *

WASHINGTON, D.C.
TUESDAY, MAY 26, 1981

* * * * *

[890] NORMAN CARLSON

was called as a witness by the defendants, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Q. State your name, please.

A. Norman A. Carlson.

Q. What is your present occupation and profession?

A. Director of the Federal Bureau of Prisons, Department of Justice.

Q. How long have you held that position?

A. Eleven years.

[891] Q. When did you first begin your career in corrections?

A. 1956.

Q. What was your first position?

A. I was a correctional officer at the Iowa State Penitentiary.

Q. What were some of your duties and responsibilities as a corrections officer?

A. I was a member of the correctional officer force and provided a variety of different functions, basically security of the institution, supervision of inmates and supervision of inmate programs.

Q. What was your next position in corrections?

A. I returned to the Iowa State Penitentiary and was called a sociologist.

Q. You say returned. Where had you gone in the in-between years?

A. My initial assignment, Mr. Dutterer, was while I was a graduate student at the University of Iowa. I worked one summer, approximately four months, as a correctional officer. I then returned to school and finished graduate school and then went back to the state penitentiary.

Q. What degree did you receive in graduate school?

A. Master of Arts in criminology.

Q. I'm sorry. Did you say in criminology?

A. A Master of Arts in criminology.

[892] Q. After you completed your work in Iowa, what was your next position in corrections?

A. I joined the Federal Bureau of Prisons in 1957.

Q. To what institution were you assigned?

A. The U.S. Penitentiary, Leavenworth, Kansas.

Q. What was your position there?

A. Case worker or parole officer.

Q. How long did you stay at Leavenworth?

A. Approximately two years.

Q. What was your next position?

A. I went to the Federal Correctional Institution in Ashland, Kentucky.

* * * * *

Q. You indicated that you became Director of the Bureau of Prisons eleven years ago. Was that 1970?

[893] A. That's correct.

Q. Were you appointed to that position at the time Richard Nixon was President of the United States?

A. Yes, I was.

THE COURT: Everybody since then has asked him to stay on, and he's on now.

* * * * *

[894] Q. Do you have occasion in your position as Director to talk to state correctional officials?

A. Yes, I do.

Q. Do you have occasion to talk with other experts in corrections?

A. Yes, I do.

Q. Do some of those include researchers and scholars at educational institutions?

A. Yes, it would.

Q. How many facilities are there in the Bureau of Prisons' correctional system?

A. There are 43.

Q. Are they classified according to their security levels?

A. Yes, they are.

Q. Would you explain that?

[895] A. We have six security levels. Level six is the most secure, the maximum-security institution, of which there is only one, the facility at Marion, Illinois. And they're graded down to level one, which are the minimum-security camps, such as the one at Allenwood, Pennsylvania. It's a spectrum from level six to level one, with six being the most secure and level one being the least secure.

Q. How many inmates are housed in the Federal system?

A. 25,000 today.

Q. Do you have any facilities that are classified under the category of administrative?

A. Yes, we do.

Q. What does that mean?

A. These are institutions that serve multiple functions, pretrial functions, a hospital, for example, at the medical center at Springfield, Missouri, and other institutions that would accept more than just one security level of inmate.

Q. Are these institutions spread out through the United States?

A. Yes, they are.

Q. Do the institutions house people from state systems?

A. Yes, they do.

Q. Do they house people from the District of Columbia?

A. Yes, they do.

[896] Q. Are these special arrangements that you have with the states, or are they statutory provisions?

A. The statute permits us to contract with the states upon request. We do that. At the present time, we have some eight hundred state inmates in federal institutions.

THE COURT: That doesn't include the District of Columbia.

THE WITNESS: That does not include it. There are an additional twelve hundred, approximately, District of Columbia offenders in the federal system.

BY MR. DUTTERER:

Q. What would be some of the circumstances under which you would take a state offender. Not the District of Columbia, but a state offender.

A. Most of the state offenders are difficult management problems, escape risks and seriously disruptive inmates that the states do not have the facilities to handle.

Q. Does the Bureau of Prisons provide training for their correctional staffs?

A. Yes, we do.

Q. Would you explain some of the training that's available for your staffs?

A. All new employees go through a two-week orientation program at the institution where they're hired immediately upon entering on duty. They then go to one of our two staff [897] training centers for an additional two-week in-service training before they actually report back to the institution and are given an assignment.

Q. Are there continuing educational programs and training programs throughout their careers?

A. Yes, there are.

Q. Do these continuing programs focus on current problems?

A. Yes, they do.

Q. Would that include focusing [sic] on, for example, gang problems?

A. Yes.

Q. Are gangs a problem in federal institutions?

A. Yes, they are.

Q. Is it a problem that's increasing?

A. Yes, it has increased dramatically in the past five years.

Q. Why is that?

A. I think the phenomena [sic] of gangs and terrorism that we experience in this country has permeated the prisons. I think prisons are a microcosm of society and share the same problems that you see in the outside communities.

Q. Are any of the inmates that come from the state system involved in gangs?

A. Yes, they are.

[898] Q. Is there a general characterization that you could use to describe the federal inmate, type of crime and age?

A. Not really. We cover the waterfront, all of the way from white collar and public corruption cases, down to and including some very violent aggressive acts of violence.

Q. What are some of the main challenges that face a prison administrator today?

A. The level of violence.

THE COURT: What?

MR. DUTTERER: That face a prison administrator today.

THE COURT: Main challenges you say?

MR. DUTTERER: Yes, Your Honor.

THE WITNESS: At the state level, overcrowding, of course, is by far the most serious problem. In the federal system, we're in reasonably good shape in that regard. Violence is another great concern we have. It's a challenge, of course, in terms of trying to operate institutions that are in conformity with court orders and follow the mandates that have been set down by the courts.

THE COURT: You said the states are suffering from overcrowding and you folks are in relatively better shape. [899] THE WITNESS: Yes.

THE COURT: Then you said violence. Is that both state and federal?

THE WITNESS: Yes, it is. The level of violence in federal institutions has been increasing in terms of the absolute numbers and in terms of proportion.

THE COURT: When you say "violence", what are you talking about?

THE WITNESS: In terms of homicides, stabbings, knifings, both on staff as well as on inmates.

THE COURT: You mean individual scrimmages?

THE WITNESS: That's right.

THE COURT: And then you have some rioting from time to time?

THE WITNESS: Fortunately, in the federal system, we've not experienced any major violence in terms of group disturbances or riots, but we certainly have our share of one-on-one encounters involving both inmates as well as inmates on staff.

THE COURT: Now, when you have these occurrences of violence inside the prison, the Bureau investigates that, don't they?

THE WITNESS: The F.B.I. does. That's correct, Sir.

THE COURT: Now, is there a sort of form sheet [900] on that type of thing? Inmates have a scuffle. Inmates knife one another. The Bureau moves in. Now, is there sort of an expectation on the part of the investigators to find one or two or three factors in this situation?

THE WITNESS: Yes, I think most of them—

THE COURT: Do you understand what I'm talking about?

THE WITNESS: Yes. Very definitely.

THE COURT: They say, "well, what causes this?["] What ranks, let's say, in order of frequency on a one-to-four basis, let's say. What are the general things they look for first, second, third or fourth?

THE WITNESS: I think homosexuality would probably be one of the primarily [sic] causes of inmate violence, both in terms of the parties involved, as well as a possible triangle involving a third party. Incidents where one inmate has testified against another or a friend of another in a federal court or in some state prosecution; and cases involving relationships with gangs where an inmate may have offended another gang member or a gang member's family and ergo was marked for attack because of his cooperation in that regard.

I would say those are probably the three most important contributors to violence in at least the Federal Bureau of Prisons.

[901] BY MR. DUTTERER:

Q. I show you what is Plaintiffs' Exhibits 4 and 10. These are the Bureau of Prisons' Policy Statements. I'd like to ask you first to describe the procedure that you use when implementing a new policy or revising an old policy at the Bureau such as those that are before you.

A. We have an executive staff in the Bureau of Prisons that's composed of the director and myself, the four assistant directors in Washington, plus our general counsel, and the five regional directors, who operate the five regions that constitute the Bureau of Prisons. We meet every other month, bimonthly. And all new programs or policies are reviewed by this group prior to their promulgation. In other words, draft policies are sent out in advance, and we all have a chance to review them and make comments on them at our regular bimonthly meetings.

Following those meetings, whatever changes are to be made are made, and then I sign them into effect when I return to Washington.

Q. Were the two policies in front of you formulated under that general framework?

A. Yes, they were.

Q. Now, the plaintiffs have raised a number of issues in this case, as you know, and I'd like to focus your attention on them, I believe, for your convenience and the courts' [sic], [902] one at a time.

First, I would like to ask you to look at Plaintiffs' Exhibit number 4 and direct your attention to paragraph B at the bottom of page 1 and ask you to read the first sentence, please.

A. "The warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity."

Q. Is that sentence in conjunction with the rest of the policy statement and implementing information which carries over to pages two and three, the general policy of the Bureau regarding rejection of publications?

A. Yes, it is.

Q. And in your professional opinion, does that sentence and the rest of the statement there further the maintenance of security, good order and discipline at an institution?

A. Yes, it does.

Q. Now, another point has been raised in regard to the rejection of specific publications, and I'd like to direct your attention to page 3 of that exhibit and ask you to read the first two sentences of subparagraph C.

A. "The warden may not establish an excluded list of publications. This means the warden shall review the individual publication prior to the rejection of that publication."

[903] Q. Was there a period of time in which the Bureau used to exclude a publication simply because of its title?

A. Yes, there was.

Q. And this regulation indicates that policy has been rejected?

A. That's correct.

Q. Would a warden be permitted to reject a publication even if he had rejected five or six previous issues, based on the title alone?

A. No, he would not.

Q. Would he have to review each and every publication as it came into the institution? I say he or someone under his direction.

A. Yes, they would.

Q. Why do you require the review of each publication rather than simply rejecting them by title?

A. I think the content of publications changes. What may be objectionable today may not be tomorrow. There are changes in policies in terms of the publications that a given newsletter or magazine permits.

Q. I would like to direct your attention to page 2 and on page 2 there are a number of criteria under which a warden may exclude a publication. And I direct your attention to number 2. I ask you to read that to yourself.

A. "It depicts, encourages, or describes methods [904] of escape from correctional facilities, or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions."

Q. Does the ability of a warden to reject a publication—does that further the maintenance of security, good order and discipline in an institution?

A. Yes, it does.

Q. Why is that?

A. I think any time you would permit material to come into an institution that would give ideas or clues or hints as to how to escape could well be used by inmates to do just that, to attempt to escape from the institution.

Q. Is that particular provision too broad or too vague?

A. I do not believe so.

Q. I direct your attention to subparagraph 5. I ask you to read that.

A. "It depicts, describes or encourages activities which may lead to the use of physical violence or group disruptions."

Q. Does that particular provision which permits a warden to exclude a publication that falls in that category further the maintenance of security, good order and discipline in an institution?

A. Yes, it does.

[905] Q. Why is that?

A. One of the things we've tried to do in our correctional institutions is keep them as safe as we possibly can, safe for both staff as well as inmate. And I think anything which would come into an institution that would further the violence that is all too traditional in a prison environment is certainly something which we would attempt to guard against. It's certainly detrimental to the good order and functioning of the institution.

Q. Is it possible that a publication might not lead to the use of violence or disruption —

THE COURT: Might not what?

BY MR. DUTTERER:

Q. —Might not lead to the use of physical violence or group disruption at one institution, but do so at another?

A. Yes, very definitely.

Q. In your professional opinion, does the warden of a particular institution need the discretion to decide whether

it would or would not affect his institution at any given time?

A. Yes, he does.

Q. Would part of his discretion include consideration of some of the gang problems you spoke of?

A. Yes, it would.

Q. Let me direct your attention to number 6. I ask [906] you to read that one.

A. "It encourages or instructs in the commission of criminal activity."

Q. Do you think that is vague and too overbroad?

A. I don't think so. I think it's very clear and explicit.

Q. Let me direct your attention to number 7 and ask you to read that one.

A. "It is sexually explicit material, which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity."

Q. Now, under that particular provision and continuing over to page 3, there's a number of paragraphs in bold type. Do you understand that to be implementing information?

A. Yes, I do.

Q. What does that mean?

A. That is the guidelines given to the warden and staff of the institution as to how to actually implement or interpret the policy that's been established.

Q. Is that provided for the purposes of attempting to insure some uniformity in decision-making?

A. Insofar as possible, yes.

Q. Again, is it possible at one institution a warden might exclude a publication which falls under number 7, [907] but that same publication falling under number 7 would not be excluded at another institution?

A. Yes, it is.

Q. Why is that?

A. The differences in the institutions, the differences in the types of inmates confined there, and the different climate of the institution. If a given institution has a particular problem at one time, the warden would have a different basis on which to make a decision than would another warden given a different set of circumstances.

Q. You mentioned that homosexuality is a problem — indeed, maybe the number one problem in the correctional systems. Is it possible that a warden at one institution with a problem involving homosexuality might reject a lot of homosexual publications and another warden would not?

A. Yes, he would.

THE COURT: On that particular point, from what I've heard up to now, homosexual relationships to some extent are part of the prison lifestyle. And it probably exists to a greater extent here than it does here or it does here or some place else. I'm interested in why you say that a warden, having in mind the fact that he has some homosexual problems, might exclude a magazine that rather explicitly suggests homosexual conduct and a warden some place else wouldn't do it. I mean, I don't quite understand that. [908] THE WITNESS: Well, your honor, in a level-one institution, for example, such as Allenwood, Pennsylvania, given the type of inmates we can find there, I'm certain the warden is not nearly as concerned about homosexual activity as the warden would be at Lewisburg, or at Leavenworth or at Marion.

First of all, the classification system we utilize tends to screen out fairly well the aggressive assaultive inmate from the more passive inmate, who is not going to present a problem in terms of violence.

In addition, inmates at Allenwood have much more frequent access to furloughs, the ability to go home and visit their families and to have their wives visit them than would

the inmates in another institution. So that institutions do vary by types of inmates that are confined there.

Also, problems arise at one particular time in an institution, a particular problem, for example, which may not be present in another institution.

Institutions are a dynamic phenomena. They do change very frequently. The composition of the inmates changes, and the types of problems that the inmates present change.

THE COURT: In the same institution?

THE WITNESS: In the same institution. That's [909] correct, sir.

BY MR. DUTTERER:

Q. Do you understand that the Bureau of Prisons has a policy whereby if a publication is rejected, it's rejected in its entirety rather than cutting and pasting the publication?

A. That's correct.

Q. Why does the Bureau have that policy?

A. There are several factors. One, of course, is the administrative workload. Our resources in terms of personnel are limited. We simply don't have the manpower to cut and paste the various publications.

Also, I think that most inmates would find the censorship that we saw in the past something that they do not care for. They would far rather see a publication excluded in toto than a piece cut out of the center, which they certainly would raise questions about its contents in that particular issue.

THE DEPUTY CLERK: Government's Exhibit number 11 marked for identification (G-174).

(Whereupon, Defendants' Exhibit number 11 was marked for identification.)

BY MR. DUTTERER:

Q. I show you what has been marked for identification as Defendants' Exhibit number 11. I ask you to de-

scribe [910] that document.

A. In preparation for this trial, we attempted to gain information as to the amount of staff resources that were being expended in this general area of publications coming into our institutions.

A teletype was sent out from my office to all of our wardens asking them to furnish us with estimates of the manpower requirements in their given institution.

Q. Is page one a copy of that teletype?

A. Yes, it is.

Q. And are the four attached pages a summary of the responses prepared by someone in your office?

A. Yes, they are

Q. I'd like to ask you to read question number one on the teletype.

A. "How much time (in hours per average month) is spent at your institution in checking for contraband and screening content of publications, newspapers, catalogues, etc. by all mailroom personnel?"

Q. I ask you to look at the third page in that exhibit. Does the information contain there the summary of the total hours?

A. Yes, it does.

Q. And how many hours were spent in response to question number one?

[911] A. 2,077 man hours per month.

Q. Is that reduced to man years per year?

A. Yes, twelve-and-a-half man years.

Q. And what is the second question directed to?

A. "How much time (in hours per average month) is spent at your institution by the warden, supervisor of education and anyone other than mailroom personnel involved in the process of screening publications, newspapers, etc. for admission under policy statement 5266.3?"

Q. And what is the summary of the responses?

A. 771.5 man hours per month or five man years.

Q. What is question number three?

A. "How much time (in hours per average month) is spent at your institution by all personnel in opening special mail in the presence of the inmate?"

Q. And what is the summary response?

A. 2,105 man hours per month or approximately 12.6 man years per year.

Q. And, finally, what is inquiry number four?

A. "How much time (in hours per average month) is spent at your institution by all personnel opening and inspecting mail in the mailroom?"

Q. And what is the summary response?

A. 5,014 man hours per month, or approximately thirty man years.

[912] Q. In your opinion, if you were required to cut and paste particular publications, would the amount of man hours presently spent increase?

A. Yes, it would.

Q. I'd like to direct your attention to page 3 of exhibit number — that's Plaintiffs' number 4, the policy statement. There is a question regarding — an issue regarding the due process in the rejection of publications. And I'd ask you to look at subparagraph (D). And does that paragraph describe the procedure that the Bureau follows following rejecting of a publication?

A. Yes, it does.

Q. And I'd ask you to read the third sentence to the conclusion of subparagraph (D).

A. "The warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the administrative remedy procedure unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the

security, good order or discipline of the institution, or to encourage or instruct in criminal activity."

Q. Is it the policy of the Bureau in most cases to at least permit the inmate an opportunity to review the publication?

A. Yes, it is.

[913] Q. I direct your attention to paragraph (E). Does that paragraph provide that the warden should retain the publication in his facility in case it is needed for review on appeal?

A. Yes, it does.

Q. Another issue that has been raised is one that's entitled "the excluded list," and did you not testify a few moments ago that there is no excluded list in the Bureau of Prisons?

A. That is correct.

Q. And, indeed, it's prohibited by the program statement?

A. That is correct.

Q. Now, I direct you attention to Plaintiffs' exhibit number 10, the program statement entitled "Correspondence." I direct your attention to page 9, and does subparagraph 9 on page 9 state the Bureau of Prisons' policy regarding correspondence between confined inmates?

A. Yes, it does.

Q. And in summary terms, would you describe that policy?

A. The warden may, if he deems appropriate, allow inmates to correspond if they're in different institutions.

Q. And may inmates correspond if they have relatives or members of the immediate family in another institution?

A. Yes, they may.

[914] Q. May they correspond if they're a party or a witness in a legal action?

A. Yes, they may.

Q. Why don't you simply permit all inmates to correspond without these special provisions?

A. I think to preserve the good order or [sic] our institutions and the systems that we operate, we must restrict inmate-to-inmate correspondence unless there's a legitimate reason for that correspondence to exist.

The federal system does house, as I've indicated, some 800 state inmates. A number of other cases that are in our institutions are there because they're under protection or for protection. And I think that to allow inmate-to-inmate correspondence as a general rule would certainly create additional problems for us in terms of security and the good order of our institutions.

Q. In your professional opinion, does this provision further the maintenance of security, good order and discipline?

A. Yes, it does.

Q. Couldn't an inmate simply use telephones or whisper a message to a visitor in order to get it to another inmate?

A. The possibility obviously exists. There are other means of communication, but I think the mail is certainly one over which we can exert some control. And I think we simply must to preserve the good order of our facilities.

[915] Q. Why don't you simply just read all of the mail that goes from one inmate to another inmate?

A. The manpower that would be required would be very great. In addition, inmates find a variety of different ways in which they can communicate, either through an informal code system or other means and use that as a vehicle to get the message to another institution without coming right out and saying something which the staff might be able to pick up.

Q. You say an informal code. You're not referring to a system of A equals one and B equals 2, are you?

A. No. Code words, nicknames and words that may appear very innocuous on the surface, but may have a very personal and deep meaning within a prison gang, for example.

Q. Is there concern that gang members, who are scattered throughout the system, would use this method to communicate with each other?

A. Yes, there is.

* * * * *

BY MR. DUTTERER:

Q. You were discussing a moment ago some of the reasons that prisoner-to-prisoner correspondence is not generally [916] permitted.

MR. NEY: Your Honor, could I ask that we wait until my clients are here?

THE COURT: Yes.

MR. DUTTERER: Oh, I'm sorry.

* * * * *

BY MR. DUTTERER:

Q. A few moments ago you were discussing some of the concerns about permitting one inmate to correspond with another inmate as though he or she were a member of the public. And you had discussed a concern about communicating in sort of a code or jargon or language that they would understand. And earlier you had discussed gangs in federal [pr]isons. Is there a concern that these gang members will communicate with each other?

A. Yes, there is.

Q. What are some of the activities that the gang members might try to perpetuate or continue by communicating with each other?

A. Obviously they could attempt to further a criminal activity either in the prison or in the community. The most dangerous thing I could think of would be to order the execution or murder of someone who has testified against them or has not cooperated with them.

[917] Q. Does the federal system have in its facilities people who are placed there either from the States or from other federal facilities in sort of protective-custody status?

A. Yes, we have many cases of inmates who are being protected while they're in the Federal Bureau of Prisons.

Q. In general, what are some of the ways that you attempt to do that?

A. We, of course, attempt to transfer them to institutions where their lives will not be in jeopardy. We try to move them away from the scene of the incident.

For example, if the inmate is from the East Coast, he'd be transferred to the West Coast to move him as far geographically as possible and to separate the inmates from people who may have a vendetta against him or her.

Q. Do you believe that the unfettered communication between inmates would compromise this program?

A. Yes, I do.

* * * * *

[926] Q. Let me direct your attention to the next issue. It's referred to as news clippings and correspondence. Does the Bureau have a policy which automatically rejects any news clippings that come with correspondence?

A. No, it does not.

Q. How are news clippings that would come with correspondence treated?

A. On a case-by-case basis. The content of the news clippings would be the determining factor as to whether or not it would be permitted to come into the institution.

CROSS-EXAMINATION

* * * * *

[974] Q. The question is do you feel those two opinions, one warden who would exclude materials of any actual sex act and another supervisor of education, who can allow in any materials like that — doesn't that allow or encourage those kinds of differences that we've been talking about under the Bureau Policy Statement?

A. In part, although obviously the warden is the final decision-maker in the institution. The supervisor of education is merely one of several hundred staff members. Each of our staff or many of our staff do have different opinions. I certainly would encourage different opinions among staff, but the warden is the man ultimately responsible and charged with the security and order of the institution. And I defer to that man's or that person's judgment in [975] these and other matters.

Q. Are you aware that Debra Spidle, the mailroom clerk at Lewisburg, explained that the standard she used in referring items up for further review was as follows: "I have a standard. Sex is a standard. Radical is a standard. I would go out on a limb and say communism and fascism is a standard I would use. It's more of a political sexual type standard I personally use. I have not been told."

MR. DUTTERER: Again, your Honor, I would ask for the date of the deposition that Mr. Ney is reading from. I assume he is reading from a deposition.

MR. NEY: This is from the same period of time in the fall of '77.

THE COURT: '77?

MR. NEY: '77.

THE WITNESS: Again, she is not making the final decision. She is referring the matter for further discussion and deliberation by other staff members who would make the final decision.

We have 10,000 employees in the Federal Prison System. We do have standards. We have guidelines that we have promulgated. And I think the system does work quite effectively to elevate to the warden for the ultimate decision on the rejection or acceptance of publications.

THE COURT: Don't the present rules sort of neutralize [976] that kind of business?

MR. NEY: No, your Honor. It still allows the exact same discretion. It says, "any sexually-explicit material can be kept out if the warden thinks it's detrimental to security."

BY MR. NEY:

Q. Let me call your attention to a magazine called *The Call*. It's marked as Plaintiffs' 15. Do you recall at your deposition being asked to review a page from *The Call* relating to the Marion Control Unit on page 3?

A. Yes, I do recall seeing the publication during the deposition.

Q. And do you recall at that time stating that you would not sustain exclusion of that article, which you read about the Marion Control Unit, from Marion at the present time?

A. In 1981, that's correct.

THE COURT: What's the date on the publication?

THE WITNESS: This is 1977, four years ago, March of '77.

MR. NEY:

Q. Now, are you aware that this paper was excluded from Marion and Atlanta?

A. During 1977 I believe you mentioned that it was. I have to accept that. I don't know for a fact.

Q. Are you also aware that this paper is regularly [977] allowed into Lewisburg?

A. During 1981?

Q. No. At the time in 1977.

A. It may well have been. I don't know for a fact.

Q. All right.

Are you also aware that the warden at Atlanta—the associate warden at Atlanta a year later at his deposition stated that he would exclude this article, or he would exclude it again if it came to him in 1978 because “anytime you talk about insurrection or anything like that, you can guess it’s going to happen.” And he believed that this article would tend to incite inmates into work stoppages, riots, and assaults on staff and inmates.

Does your policy allow that kind of distinction being made between institutions?

A. Yes, if at the time the associate warden or warden in Atlanta felt that the tensions and problems within that institution were such that it could create a disturbance or insurrection, he would have the authority to ban publications. But, again, it’s upon the circumstances at the time as known by the staff member, warden or associate warden who is in charge of that institution.

* * * * *

WASHINGTON, D. C.
WEDNESDAY, MAY 27, 1981

* * * * *

[995]

GARY McCUNE

a witness, called for examination by counsel for the defendant[s], having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

Q. And what is your current occupation?

A. I am Regional Director of the Southeast Region[,] Federal Bureau of Prisons.

* * * * *

[1009] Q. Was homosexuality a problem at [Petersburg Correctional Facility]?

A. Yes, it’s a problem at every institution, I think.

Q. What did you, as a Warden or Chief of Classification, attempt to do in order to cut down on homosexual activity?

A. Well, I don’t think anyone directly was involved particularly in that position. I think it’s an issue we constantly wrestled with on how we could control it and handle it. The biggest concern is the predatory kind of behavior. It’s hard to stop or control consenting behavior except as we can supervise and discipline it when it’s encountered.

* * * * *

[1034] Q. In your 20-some odd years as a prison official, are you able to reach the conclusion that there is considerable, that homosexual activity generates violence?

A. I don’t think there is any question about it. I think it’s probably one of our top two causes of violence in the institution. I would rank homosexual encounters or conflicts and drugs particularly as the top two causes. And debts follow very close behind probably. But homosexuality would be the top or one of the top two.

* * * * *

[1037] THE COURT: [A]s you look back over it, to the amount and the problems generated by the homosexual

publications * * * [a]re they exacerbated [sic] or just about the same or can you say that the existence or presence or absence of these publications makes any difference to you or contributes to your problems or what?

THE WITNESS: Well, I guess we were talking about Playboy, for example. Specifically the homosexual type literature that's clearly homosexual oriented—not necessarily Playboy, which is basically heterosexual—the homosexual magazines do contribute to the problem specifically because of the targeting theory. In other words, as I mentioned earlier, we have the predatory type of inmates constantly on the roam to try to identify weak inmates and homosexuals they can get under their control. There are other ways to find out about this but immediately that targets a guy as homosexual very much like a gay. If I see a person reading a golf magazine, I think I can rightly assume he is interested in golf and likes the game. So I think it has helped to contribute to those who may not necessarily want to be identified and contributes to the problem of homosexual violence in the institution.

* * * * *

CROSS-EXAMINATION

[1041] Q. Do you recall what your opinion was at the deposition about that publication as to whether or not it would be acceptable at any institution within your region at the present time?

A. I don't know. Is there a specific part of the magazine? I just don't recall.

Q. You were directed at the deposition just to look at the pictorial matter. We don't have time for you to review the entire text.

A. I think I indicated that, based upon a couple of issues in here, and one is a depiction of bestiality, that I felt I could support rejection at any institution if the Warden rejected it.

I don't know if this is the same magazine on sadomasochism. I can't find it right now. Yes, it's right here.

Q. Is that the article on Dracula?

A. Yes.

Q. On the basis of the page 18 on bestiality and [1042] the Dracula section you would affirm exclusion from every institution in your region?

A. If the Warden made the decision. I of course don't get involved unless he does exclude it and it's appealed. But I think I said in line with our policy, if it were excluded, I would support it.

Q. Now, are you aware, Mr. McCune, that issue of Hustler and other Hustlers have been sold in the commissaries at other Bureau of Prisons' institutions?

A. I think you told me. It may be. But I think that's a local decision based upon the circumstances at the institution.

Q. Is it your opinion that it is wrong to sell that issue of Hustler at the other institutions?

A. No, it's not my opinion that it's wrong. I think it has to be done based on the circumstances at the institution by the Warden on the scene and by the reviewing person, if it's appealed.

Q. Let me read you some sections of your deposition, page 54 and 55, which was taken on April 23, in Atlanta of this year.

"Q. Are you aware that other institutions within the Bureau, Level Five and even Level[1043] Six, sell Hustler Magazine in the commissary?

A. In this region?

Q. No, in other regions.

A. That may be, but I would question it. But I would not have to worry about that. In this region

they do not unless somebody violated my orders. We do not have to be concerned about rights in the commissary. You do not have to sell anything you did not want to

Q. Would that change your opinion about the likely effects that you are predicting?

A. No. That would tell me that somebody made a bad decision."

A. But you are talking about selling in the commissary, not prohibiting access to the publications. That's two different things. The institutions determine what's sold in the commissary. And I have had a number of meetings with the Wardens and made a determination with them we would not sell this particular magazine in the commissary. But that does not mean they cannot get it through subscription.

Q. I thought you just testified you would affirm—?

THE COURT: (Interposing) * * * [1044] Put your question and give him a chance to answer. * * *

THE WITNESS: I said this particular issue, because of the two items in here, that I felt I could support rejection if the Warden rejected it at the institution. I did not say Hustler Magazine per se in general I would reject. I would look at it on an issue-by-issue basis. I did say the Wardens agreed we do not sell Hustler in the commissary. But there may be other magazines we may not sell in the commissary. It doesn't mean the inmate cannot subscribe to it and get access.

BY MR. NEY:

Q. He could not get access if it was turned back at the front gate, would it?

A. That's right. If it's turned down on some particular content. It doesn't mean he cannot get other issues of that same publication.

Q. Let me see if I can understand your testimony. You would evaluate based upon the climate and the feeling of the Warden at his particular institution; is that right?

A. He makes the judgments about the climate and the tone of the institution. I am familiar with those in my region and I would use that to pass judgment on his decision, [1045] also taking into consideration the nature of the item.

Q. And you would also take into account the security level at the institution?

A. That's true, yes.

Q. But in this case, with regard to this issue of Hustler Magazine, you would affirm exclusion from every institution from the camp at Eglin Air Force Base to the Atlanta Penitentiary?

A. If the superintendent felt it would in some way affect the security or order at the institution, then consistent with our policy, I feel I could uphold that particular position on this particular issue.

Q. I'm going to show you what's been marked as Plaintiff's 54 and 55. Fifty-four is Playgirl. Fifty-five is Playgirl Calendar for 1978. Do you recall being shown Playgirl Magazine at your deposition?

A. Yes, sir.

Q. Do you recall that your testimony was that you would exclude Playgirl Magazine from every institution in your region? Do you recall that in your testimony?

A. During the deposition you were constantly putting me as being the Warden. In what context are you asking me the question? As Regional Director, yes, I would affirm.[1046] If the Warden decided to exclude it, I could uphold that exclusion.

Q. And if you were the Warden you would exclude it from every institution in this region?

A. Using the same rationale that I would use to uphold it. I think Playgirl Magazine, at a male institution, would only appeal to a homosexual and it gets back to the targeting issue.

Q. And are you aware that this magazine is acceptable at Lewisburg, which is a major maximum security penitentiary?

A. I am not aware of it.

Q. Would that change your opinion?

A. No, it would not.

Q. So as you understand the policy of the Bureau of Prisons, it allows exclusion of Playgirl at every institution within your region, from One to Six, but at the same time it could be available at Lewisburg?

A. Policy doesn't exclude any particular item.

* * * * *

[1051] Q. I show you Plaintiff's 80. Does that indicate that the January, '79 issue of Hustler was rejected from Atlanta?

A. Yes.

Q. And Plaintiff's 81, does that indicate that the magazine entitled The Best of Hustler was rejected on January 21, 1980 on the grounds that lesbianism is considered a danger to the security, good order and discipline?

A. Yes.

Q. Is it your testimony now that those issues of Hustler were improperly excluded from the institutions listed in those exhibits?

A. I don't have any way of telling that in terms of the rationale as to why it was made. I have not seen the articles. And the policy has changed.

Q. Is lesbianism a basis for excluding a publication in a male institution at the present time?

THE COURT: Apparently it is. It was, wasn't it?

MR. NEY: He said it changed.

[1052] THE WITNESS: I think it would be unlikely to be restricted just on that. In fact, I think a number of these that were restricted may very well be accepted now. But there's no way to tell from this information.

* * *

[1057] Q. What is your position today, having read the article which was critical of the Bureau of Prisons' medical [1058] system, with respect to the institutions in your region today?

A. Today I wouldn't be concerned about it. I am not rejecting, even at that point, just based on a criticism of the Bureau of Prisons. But it accused the Bureau of Prisons of murdering certain inmates, which is not true, and I think might further inflame a concern on the part of other prisoners. It's more diluted at this point the further removed from the actual situation, and it would have less impact at this point. If a Warden gave me a specific reason wanting to reject it and gave me some rationale, I would certainly have to consider that, even at this date. But I don't exclude things and Wardens don't normally either. I would not support it just because they differ with the Bureau of Prisons or challenge the Bureau of Prisons.

* * * * *

[1067]

JAMES HENDERSON

called for examination by counsel for the defendant, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Q. What is your current employment?

A. I am Regional Director of the North Central Region of the Bureau of Prisons, Kansas City, Missouri.

* * *

[1073] Q. Does homosexual activity tend to generate violence, in your experience?

A. I would say, as Mr. McCune mentioned earlier, that homosexuality has been one of the prime causes of violence in prisons. Not too many years ago, I was the head of the Board of Inquiry at Lewisburg because of the number of murders. And I recall, the reason for the investigation was there were eight murders and five of those had homosexual acts or homosexual pressure.

Q. Did you serve on the Board of Inquiry?

A. Yes, I chaired it.

Q. Could you please explain how the Board of Inquiry got appointed? What precipitated this?

A. There was a lot of community and judicial interest in some of the problems at Lewisburg that were communicated to the Director of the Bureau of Prisons. And the Director appointed the Board of Inquiry to look into the causes and the overall operations at the penitentiary at Lewisburg.

Q. And five of these eight homicides were—I'm not sure I quite got what you said.

A. Were directly related to some form of homosexual activity. Either someone was being pressured that didn't like [1074] it and struck out at the predator or else the predator killed the victim.

Q. Was this surprising to Bureau officials?

A. It seemed like there was a heavier concentration at that institution. And that was the reason for the special Board of Inquiry, which a Board of Inquiry being appointed for disruptions or some management problems is not unusual. The Director has, we have a policy for that.

But it came in a very short time span, and Mr. Carlson felt that we needed a review of that institution.

Q. What is it that, in your view, what is it in publications, that involve explicit homosexual activity or bestiality or children's porn that can be labeled a detriment to the security or good order of [sic] discipline of an institution?

A. We have a closed society. And many are there for violent acts. And I think this can arouse emotions of those confined. Many, as has been mentioned earlier, are not the most stable people in the world.

Q. Publications in some way encourage activity?

A. Right. And also it identifies the person that is interested in either homosexual activity or bestiality or makes him a target for others to attack.

Q. If homosexual publications are allowed into an [1075] institution, in your opinion, is there an air of legitimacy attached to homosexual activity?

A. I think management of an institution sets the tone and the climate. And to do that, it must communicate to the staff and to the inmates what their expectations and what their standards are. And I believe to permit it in would be a message to both that it was condoned.

Q. When you talk about targetting, are you talking about someone's reading a publication targetting him for an assault, necessarily?

A. It certainly is one possibility, yes.

Q. Does it target him for consensual [sic] activities as well?

A. It would make it known what his interests were. Not every homosexual has special mannerisms; some are very undecided about which lifestyle they will choose. And then there are some that just definitely aren't interested. Some homosexuals are selective; some are not selective. So this would identify anyone reading that would identify that group.

* * * * *

[1112] Q. Would it be much of a burden for the prison officials to have to [delete objectionable material from publications rather than reject the entire publication]?

A. You have heard a lot of man years are expended in the mailroom. I think it would delay. It's practically [sic] impossible.

* * * * *

CROSS-EXAMINATION

[1136] Q. And you are again aware that these have been coming into the institutions in the North Central Region?

A. Yes.

Q. And to your knowledge, have those caused any problems, have any problems been called to your attention?

A. Not called directly to my attention, no.

[1150Q] Q. Have you had a chance to review the article that first I wanted you to read the reasons for rejecting this publication?

A. I have read that letter.

Q. Could you just read into the record what was the reason for rejecting the publication from Leavenworth?

A. "The May 15, 1981 issue of Win Magazine has been rejected by U.S. Penitentiary, Leavenworth, Kansas. On pages 19, 20, 21 and 22 and 23 of this issue depicts, describes or encourages activities which may lead to use of physical violence or group disruption."

Q. And have you had a chance to look at those [1150R] pages in the magazine?

A. No, I have not.

Q. Just on the face of the rejection letter, does that meet the standards set out in the Bureau of Prisons'

policy? Because look at the rejection letter. It states the page number — .

A. (Interposing) It says "disruptive to the good order of the institution."

Q. So is that enough?

A. I don't know what is in these pages which might be more specific. The inmate has a chance to review this material also if he is going to appeal it.

Q. Just looking at the rejection letter on its face, does that meet the requirement in the policy statement?

THE COURT: Exhibit 99?

MR. NEY: That right.

BY MR. NEY:

Q. Is it specific enough to meet the requirements of the policy statement?

A. It should spell out more specifically the purpose of the rejection.

Q. It should be more specific than it is?

A. Yes, sir.

[1150S] MR. NEY: Your Honor, I would like to have the witness to have an opportunity to look at the few pages that were the subject of the rejection and have him give his opinion as to in what way those pages about Federal Bureau of Prisons are detrimental to security. I think I know it may take a few minutes, but I think it may be worthwhile in the interest of understanding what the thought processes are that are going on here, because we are challenging the constitutionality of these decisions.

THE COURT: Do you have Exhibit 99 in front of you?

THE WITNESS: Ninety-nine, yes.

THE COURT: Do you have Exhibit 100 in front of you?

THE WITNESS: Yes, sir.

THE COURT: Okay, go ahead.

(Witness examining document)

BY MR. NEY:

Q. Have you had a chance to review that?

A. Yes.

Q. And would you today affirm or reject or reverse the Warden at Leavenworth?

A. This is the first I have seen it, and it's a [1150T] hurried review, but based upon the information I have without having talked to the Warden, which I have not done with this, but I would probably let it into the institution.

Q. And is that because it does not encourage or lead to group disruption or violence?

A. It's a critical article of Federal prison industries. But we get criticized, so that in itself, I would probably let it in.

* * * * *

WASHINGTON, D. C.
THURSDAY, MAY 28, 1981

* * * * *

[1153] DR. PETER L. NACCI

was called as a witness by the Defendants and, having been first duly sworn, was examined and testified as follows:

[1154] DIRECT EXAMINATION

* * * * *

Q. What is your current employment?

A. I am the Director of the Staff Training Center at Atlanta, Georgia.

* * * * *

[1169] Q. So, that there is some reason to believe that pornography could lead to violence in prisons?

A. I would say yes, and I would say indirectly, perhaps, through arousal or increased sexual activity. These people are reading this material for some reason, and I think primarily to get aroused.

Q. So, there's sort of an indirect correlation between the pornography and the violence?

A. Let's put it this way: If the material is stimulating sexual behavior, and if there's a connection between sexual behavior in prisons and violence, which I think there's no question about, then, yes indirectly I [1170] would expect that pornography, either heterosexual or homosexual, could lead to increased aggression in prisons.

And I think I made the point that there is evidence that homosexuality is tied to violence in prisons, and I'm referring specifically to Hans Toch's work in the California prison system.

As a Chairman of a major task force in 1968, Toch reported that 25 percent of all assaults that were occurring in that prison system were motivated by homosexual activity. A recent publication called "Prison Homicide," by Sylvester from Bates College, indicates that homosexual activity is either the first or second most frequent motive for homicides in all American prisons in a calendar year, and I think that's pretty compelling evidence.

* * * * *

[1205] Q. We heard that not much homosexual material gets into prisons. If that's the case, and if more homosexual literature were to get into the prisons—

THE COURT: You said you heard not—

MR. JAMESON: Not much homosexual literature—not much homosexual material gets into the federal prisons, and if more material than is now getting in

were to get in, is there any opinion that you would have with respect to how these questions and answers might—how the answers of these [1206] questions might differ?

THE WITNESS: Yes. I think particularly on these questions, they would be higher.

In other words, not having the material visibly displayed and not having it easily accessible, would tend to repress the results—would tend to suppress the results, I'm sorry.

BY MR. JAMESON:

Q. In your view, it is reasonable to assume that the increase of explicit homosexual material into the federal prisons would increase the perceptions of legitimization and targeting?

A. That would be logical.

* * * * *

[1216] JACK G. YOUNG,

was called as a witness by the Defendants and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Q. What is your present occupation

[1217] A. Commissioner of Corrections, State of Minnesota.

* * * * *

[1223] Q. Do you give the warden and superintendent a great deal of discretion in running their institutions?

A. Yes, sir.

Q. Why?

A. I suppose as an ex-warden I feel very strongly that there has to be a substantial amount, a substantial freedom to act delegated to institution superintendents.

There is, even in our own small system, there's a great difference in the institutions, between institutions. I think each institution has its own uniqueness, its own characteristics, and I think those have to be taken into account when departmental policies are formulated.

* * * * *

[1233] Q. I would like to direct your attention particularly to sexually explicit homosexual material.

Why do you believe it would further the maintenance of good order, security and discipline to reject that type of information?

A. I think in terms of the homosexual material, it's a difficult issue, but homosexuality is a problem in any one sex society, as a prison is and it's accentuated much more in a prison than in the military or a college, and I think each institution has a mission and a purpose, and I think that common sense dictates that to saturate, to saturate an institution with sexually explicit, homosexual type publications would not be in the best interests of the institution or the order of the institution, the security of the institution.

I can't help but feel in my professional judgment, and I don't have studies that I have personally done, but I can't see how that would not tend to increase, in terms of stimulation, in terms of arousal, in terms of some of the problems that you have in prisons—I think it would tend to increase the problem rather than decrease it.

* * * * *

[22] **CLAIR A. CRIPE**

was called as a witness on behalf of the government, and, having been first duly sworn, was examined by counsel and testified as [23] follows:

DIRECT EXAMINATION

* * * * *

Q. What is your current occupation?

A. I am an attorney in the Federal Bureau of Prisons.

Q. What is your title?

A. General Counsel.

* * * * *

[38] A. This survey shows that for that seventeen month period [from November 1979 through March 1981] there were ninety-six complaints filed by inmates for any type of reason—any kind of complaint dealing with publications.

At the local or Warden level as a basis of those complaints, eighteen wardens granted relief and turned the decision around.

Sixty-three affirmed their original decision.

Of those sixty-three, forty-three of the sixty-three appealed to the Region on a BP10.

At the regional level six turned around the warden's decision and thirty-six affirmed the warden's decision.

Of the thirty-six, twenty-one appealed to my office—of the twenty-one appeals during that period of time, which pursued the process, all the way to the end, eight were granted and eleven were denied

Q. Did you calculate the percentage that were turned around?

A. Yes, we did. The percentage both as the percentage [39] of turn-arounds, of reversals at each level, as well as the total percent of relief granted or reversals.

Q. And what is the total percent of relief granted?

A. Out of the total ninety-six that were initially filed—exactly one-third, or thirty-three percent, were turned around through this review procedure.

Q. So, during a seventeen month period, there were only ninety-six appeals filed regarding rejection of publication[s]?

A. That's correct.

Q. Does this include all forty-three institutions?

A. Yes.

Q. All of approximately twenty-five thousand inmates, is that correct?

A. It includes many more thousands than that—it includes twenty-five thousand inmates at any one time. Yes.

Q. So it would be more than that because some are coming and going through the system?

A. That's correct.

Q. And it is your testimony that a survey of your materials indicates approximately five or six appeals a month in the last year and a half—approximately—year and a half?

A. It would come out to about, between five and six, yes.

* * * * *

EXCERPTS OF DEPOSITION TESTIMONY

DEPOSITION OF NORMAN A. CARLSON
WASHINGTON, D.C.
TUESDAY, APRIL 21, 1981

EXAMINATION BY PLAINTIFFS

* * * * *

[72] Q. Well, were there any security threats presented by excluding the parts that were objectionable and allowing the inmate to have the part that is okay?

A. Well, one obvious one is the amount of manpower that that required, to sit down and literally excise the parts that were considered objectionable.

Q. Aside from the manpower that was needed is there anything else that was of a security concern by excising those portions and giving the inmate the remainder?

A. I can't think of any offhand.

* * * * *

[86] Q. Let me ask it in a different way. Reading the article on page three about the Marion Control Unit, does that article, if it came into Marion today would that be a security threat, in your opinion?

A. Not today, because this entire matter, that entire [87] case has been litigated since 1977.

Q. And if it came into any other Federal prison at the present time would that present a security threat?

A. Again, probably not, again, for the same reason; because the entire matter has been fully litigated.

* * * * *

[90] Q. I would like to show you a copy of "Join Hands" for October/November, 1976. You can look at the larger copy; it might be easier to read.

I would like to have that marked as Carlson Exhibit No. 12.

(Whereupon, Plaintiff's Exhibit No. 12, Carlson Deposition, was marked for identification.)

BY MR. NEY:

Q. I would like to call your attention to the first two pages, the editorial and then the article about Gay Demos, and ask you if you think those would constitute a threat to security?

A. Well, again, the publication you are handing me was in 1976. The policy has recently been not applied, as I [91] indicated previously in my testimony. I would assume today that most wardens would permit this publication into their institutions.

Q. And do you preceive [sic] this publication, from your cursory review, as not being a threat to the security of the institution?

A. Surely not as much of a threat as some of the other homosexual publications that I have had a chance to read.

Q. Would you please look at the poem on page four, entitled "Ode to Hogpens & Their Keepers"? Do you see that as constituting a threat to security at any of the Bureau's prisons or institutions at the present time?

A. I haven't had a chance to read the entire poem; it is rather lengthy, but obviously, it casts the staff in a very derogatory sense. It certainly doesn't enhance our ability to interrelate, for staff to relate to inmates.

Again, as I said earlier, I think that given the standards of 1981 and our new policy, most institutions would probably permit this in.

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DEPOSITION OF CLAIR A. CRIPE
WASHINGTON, D.C.
NOVEMBER 21, 1978

EXAMINATION BY PLAINTIFFS

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[II-14] MR. NEY: Let the record reflect that the parties have agreed that there have been approximately 15 administrative remedies filed at the General Counsel level within the past year, since November of '77.

MR. KIRSCHBAUM: Yes.

THE WITNESS: Dealing with?

MR. NEY: Dealing with publications.

BY MR. NEY:

Q. Can you recall within the past year on how many occasions you yourself made an inquiry at the regional or local institutional level with respect to local conditions relating to the rejection of a publication?

A. I don't recall.

Q. You don't recall making any?

A. No. I don't recall how many. I thought that was the question.

[II-15] Q. That's right.

Do you recall making an inquiry on at least one occasion?

A. Yes.

Q. Do you recall making an inquiry on more than one occasion?

A. Yes.

Q. Do you recall who you contacted?

A. I recall two times who I contacted.

Q. And who was that?

A. One time was the Northeast Regional Office, and another time was the -- well, in that same case I also talked to the warden at Petersburg, and another time it was the Executive Assistant at Marion.

Q. Did you say the Executive Assistant?

A. Yes.

Q. That's at the local institution?

A. At Marion.

Q. Do you recall what publications those two contacts were in reference to?

A. Not for sure. I haven't been through these (indicating). That might bring it back. I believe the one at Philadelphia, the Northeast Regional Office, was a [II-16] publication called "Erotic Bookplates."

Q. Erotic?

A. "Erotic Bookplates."

Q. And what about the one at Marion, do you recall what that was in connection with?

A. I believe that was a union publication, but I don't remember the name of it right now.

* * * * *

[II-86] Q. Let me show you Cripe Exhibit No. 14 and ask if this is your approval of the rejection of the March 30, 1977, issue of *The Guardian*?

A. The top page is an indication of the BP-11, the appeal decision in my office, yes.

Q. And you rejected it for the reasons stated in the letter, which is on the first page of Cripe 14?

A. Yes.

Q. Which appears right above your signature?

A. Yes.

Q. Could you review the publication which has been marked as No. 15 and indicate what portion or portions of this magazine formed the basis for your decision?

A. (Perusing.)

Q. Can you answer the question?

[II-87] A. I don't see anything in Exhibit 15 that would be an article promoting the formation of prisoner unions and I would conclude on the basis of that that our decision was based on false information that was given to us as to that being in this issue. The supporting document on this indicates that we were given that information from the institution as to the content of this publication.

Q. Do you agree that the publication also does not promote an adversary attitude among inmates toward staff?

A. I don't perceive that it does, no.

Q. It does not promote an adversary attitude?

A. In my perception, it does not.

* * * * *

[II-99] Q. Could you explain the basis for your decision of September 23, 1977, for confirming the rejection of *Workers World*, and I'm now referring to the specific issue, Cripe No. 19, the issue for April 15, 1977?

A. The basis for the support of the decision was that staff reported to me and wrote up the response as the publication supported gay rights and rebelling and boycotting by inmates, and those matters taken in combination would have been at that time a grounds for supporting rejection of the publication.

Q. Are those valid grounds for rejecting that publication today?

A. You're asking me now if this publication came in today on a rejection by Marion, would it be rejected today?

Q. That's right.

A. I doubt it very much. I don't think, even after talking to the staff at the institution that there would be a basis for supporting a rejection.

[II-100] Q. Let me now call your attention to Cripe No. 21, which is the issue for April 1st of the *Workers World*, and ask you to review it under the incoming publications standard as it would come to you through the administrative remedy process and to indicate whether or not that publication would be acceptable at Marion today?

A. (Perusing.) I doubt that I would support an exclusion of this publication, No. 21, today, but there are several articles about political prisoners and in support of prisoner demonstrations and uprising, and I think on the basis of those, I would want to talk to the warden about that issue if it came to me for review now.

Q. Assume that it came to you for review as it is contained in Cripe No. 20 with the same language, except that it contained a specific reference to page 11, which I take it is the page you were just referring to?

A. Yes.

Q. Would you affirm a rejection based on the same language in Cripe No. 20 with a specific reference to page 11?

A. No, not with the same language that's in Cripe No. 20.

Q. And why not?

A. Because I don't feel that it has anything to do with [II-101] gay rights or with boycotting.

Q. Are you also saying that your decision at the time it was made in September '77 was in error because there was nothing in this particular issue of *Workers World*, Cripe 21, relating to gay rights and boycotting by inmates that was detrimental to good order, security or discipline at Marion?

A. As to this issue, that's correct, that language would not have been applicable. I'm not saying that it was an error as to all issues, because I haven't at this point seen all issues and I don't know if there's anything that would fall

under—I think there is material in Cripe 21 that would support a conclusion of rebellion and prisoner resistance. Now, I wouldn't use the word "boycotting" to typify that if I looked at that article.

Q. Let me ask you to look at Cripe 22 and ask you the same question, would this issue be rejected from Marion today under the Bureau standards?

A. Well, I have no idea. My answer here would be the same as it should have been on the other one. I have no idea if it would be rejected at Marion today because there's a different warden at Marion today. As we discussed last time, even though the institution may be very similar, the institution at Marion is not identical today to what it was [II-102] a year or a year and a half ago, and certainly wardens are not identical. So, times have changed and I wouldn't want to conclude whether this publication, No. 22, would be permitted in Marion today or not.

But if the question is, if it were rejected today by the warden, would I affirm that rejection—is that the question?

Q. That's right.

A. My answer would be similar to that to No. 21. There are some individual articles in here. I don't see any that come under the category of promoting gay rights or activities, but as to prison problems, there seems to be, again, on page 11, a full page collection of articles on racist and oppressive treatment of downtrodden prisoners in different places around the country, primarily New York, and there also is a specific, I guess editorial response on the editorial page, page 8, to the Marion action, but as with the last one, while it doesn't immediately convince me that those would pose that kind of a threat, I would want to talk to the warden about it and I would concede that he might be able to convince me that it would pose that kind of a threat. My present opinion would be that I would

doubt that this publication, No. 22, if it were mailed to Marion today, I [II-103] doubt that it would be kept out, but that's speculative.

Q. Would you keep it out today if the warden's response was the same as in Cripe No. 20, and contained a reference to the article that you referred to on page 11 and to the note on the editorial page about the exclusion of *Workers World* from Marion?

A. If the warden concluded that because of the conditions at Marion that that would pose a threat to the good order of that institution, yes, I would. My response would not be in the same language as it was back in 1977, but I would support the rejection of the publication.

Q. What in your opinion on page 11 of Cripe 22 is detrimental to good order, security or discipline at Marion at the present time?

A. Well, every one of the articles contains emotional language about law enforcement or criminal justice officials taking unsupportable or illegitimate or oppressive actions against individuals, and I think the accumulation of one after another of these could be perceived and supportive of a prisoner view that all prisoners have the same kind of complaint. It is not conducive to good administration of a prison for all prisoners to be bombarded and people trying to convince them that no matter what their crimes that they are [II-104] illegally confined. That is not a very specific or orderly way to run an institution.

* * * * *

[II-117] Q. Well, can you tell me whether it falls afoul of the standard used in the incoming publications statement at any institution within the Bureau of Prisons, in your opinion?

A. I don't see any article in it that meets the current [II-118] test. If it were rejected today, I would expect to

get an indication from the warden as to the article on which the rejection was based. I don't see that in my review of it now.

* * * * *

[II-121] Q. I would ask you to review Cripe Exhibit 26, which is a 1979 Peace Calendar published by the War Resisters League.

A. (Perusing.)

Q. Do you have an opinion as to whether applying the standard of incoming publications you would reject this, in your own opinion and with your own knowledge of the various institutions from any institution within the Bureau?

MS. WARD: The objection is noted.

THE WITNESS: There is a lot of material in here [II-122] and a lot of it dealing with prisoners. Just leafing through it, a lot of it, if not most of it, now that I look at it, deals with oppression of prisoners.

So, to answer your question, I couldn't give you an opinion quickly as to whether it would be kept out of any institution.

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DEPOSITION OF CHARLES FENTON
LEWISBURG, PENNSYLVANIA
DECEMBER 14, 1977

EXAMINATION BY PLAINTIFFS

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[108] Q. Would you exclude a publication because it contains an article which describes the health problems of prisoners?

A. I can't imagine, frankly, ever knowing about it. We don't read the articles. I'm not interested in the articles, and the mailroom isn't. They don't have time to read articles, and I don't either.

Q. If they don't read them, how do you know whether or not the publication is objectionable?

A. Well, I suppose maybe a headline catches the eye, or it's an illustration. I really don't know how — as a matter of fact, I suspect they let a whole lot of stuff in that if they did read carefully, we might have some objection to.

Q. Would you allow in *The McKay Commission*, which is the report on the Attica uprising?

[109] A. I think it is in. It's in the form of a pocket-book, and I believe we distributed it at one time or another.

Q. Would you allow in the book *Time to Die* by Tom Wicker, which is about prison problems?

A. As long as I don't have to read it, I don't care who else does.

Q. Are there any books at all that are not allowed in Lewisburg?

A. Not that I know of personally, no.

Q. So the only things that are excluded in the publications area — I'm including books as publications — are

specific publications.

A. Well, you run into a different problem. I can conceive of the idea of a book being objectionable and being rejected. Now, I don't recall that it's happened. I haven't done it since I've been here. I'm not ruling out the possibility that it could happen.

On the other hand, I'm not about to set up a detective mechanism to make sure that every book that comes in here passes some kind of litmus test. If we get a book in here that causes problems, I suspect it will be in here and cause the problem before we know about it. At that point we will have to do whatever is necessary.

[110] And I'm not going to have the mailroom reading books coming in here to see whether or not there is something in there. I mean, that's a pretty monumental task.

Q. But you do read the magazines and publications, you do review those for content?

A. They must review something. If they find something occasionally that — have you ever gone into a post office and watched the people sort mail?

Q. Yes, I've seen that.

A. Did you ever see them sitting around reading *Life* magazine? They never read the *Wall Street Journal*.

Now, I don't really intend that as a commentary on our mailroom workers, but the fact of the matter is that the things that look interesting tend to be looked at as opposed to things that don't look interesting. So I would suspect that most of the things we reject might appear to be interesting.

Q. Is that why some of the things that are prohibited are the sexually-oriented materials?

A. Well, you define your interests, and they will define theirs.

Q. Following what you said, most of the items that seem to be on your excluded list are the sexually-[111]

oriented materials.

A. I really haven't kept a list or an orientation as to what the topics are; but if you say that, I guess it's right.

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DEPOSITION OF JACK A. HANBERRY
ATLANTA, GEORGIA
MARCH 16, 1978

EXAMINATION BY PLAINTIFFS

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[61] Q. Have you received any guidelines from the Bureau of Prisons as to what types of materials would be detrimental to the good order, security or discipline in a publication?

A. Nothing other than what you have. In showing me in the exhibits as a general guideline, no.

Q. Do you provide any guidance to any of the officials who are responsible for making these reviews as to what they should be looking for?

A. I don't personally provide them with that.

Q. Does anyone?

A. There are always training sessions by Associate Wardens and department heads regarding this kind of thing, and it is my understanding that sometimes they would discuss items such as this.

Q. Do you have any kind of rule relating to what percentage or portion of a magazine must be objectionable before you would exclude?

A. We would identify the objectionable section such as an article. The entire publication may not be objectionable but we don't assume the prerogative of deleting one or taking it out or tearing it out, defacing or otherwise. And so if there's an article in a publication which is objectionable, we conclude that the entire publication is.

Q. Do you have a rule of thumb or any standard as to [62] how much of it has to be objectionable before —

A. Any portion of it.

Q. Have you ever considered deleting the offending portion?

A. No, I have not.

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DEPOSITION OF JAMES D. HENDERSON
KANSAS CITY, MISSOURI
MAY 3, 1979

EXAMINATION BY PLAINTIFFS

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[24] BY MR. NEY: In what percentage of the cases where you got a rejection of a publication do you contact a Warden to find out what his situation is in that institution?

MR. KIRSHBAUM: Does he personally contact the Warden—

MR. NEY: Yes, right.

MR. KIRSHBAUM: Or, does the Supervisor of Education?

BY MR. NEY: Do you personally contact the Warden?

A. It would be very rare.

* * * * *

[41] Q. I am going to ask you to review an issue of *Guardian Magazine*, dated March 30th, 1977, Henderson Exhibit Number 38. And, I will also give you Henderson Exhibit Number 37, which is a BP-9, 10, and 11, regarding the rejection of that same issue of the *Guardian Magazine*. The inmate's name is James Parker, Number—rather, the Docket Number, apparently, of this item is 3994. And, I would like you to review those materials and tell me whether or not, applying the standard for incoming publications, you would allow this publication into Marion today.

* * * * *

[43] A. This is one that is talking about the prison union, and it advocated prison unions, according to Mr. Cripe, C-r-i-p-e. Like he said, this is two years old, and we are talking about right now. But, prison unions would still not be permitted in if it continued to advocate prison unions.

BY MR. NEY: And, did you find that this publication advocated prison unions?

A. The history of this. But, it does have a couple of union articles to "Don't Mourn, Organize," is one of the articles.

Q. Let me just identify for the record that you were referring to an article on Page 2 in the right-hand column, "Don't Mourn, Organize." And, on the basis of that article, it would be sufficient, then, to reject the publication?

A. Right, on union organization; encouraging union organization. That was a quick review in just a few moments.

Q. Well, let the record reflect that you reviewed it for about ten minutes.

MR. DUTTERER: Objection. It was not ten [44] minutes. I'll stipulate that he reviewed it for five minutes, but we should also indicate that it's, what, 18 by 30 inches, closely typed material, 24 pages long, very few photographs. Obviously the witness has not read every word of every page.

BY MR. NEY: I just want to understand that on the basis of this article—

A. I said it was a very quick review, and that when I saw the headline to organize—I didn't go into detail. If you want me to keep it all day, I will.

Q. Well, I am trying to find out—you said a moment ago that on the basis of that—and, I understand that you haven't spent a long time reviewing it—

A. Right.

Q. But, that you would reject that for Marion today on the basis of this file?

A. I'm basing it on several factors; this, and what has been said by Mr. Cripe.

Q. You also sustained that rejection in the BP-10 process, is that right?

A. Well, I think you need to look at our response. At that time we did not have a copy, and we asked an inmate to send us a copy of this publication, and we would be glad to review it if he did that.

* * * * *

[70] BY MR. NEY: I would ask you to review the *Militant*, Number 28, and tell me whether there's anything in that publication which would warrant rejection today, applying the standard?

* * * * *

[72] BY MR. NEY: Could I have your opinion?

A. Is that what you are asking me?

Q. Yes. Based on your review of the publication, pursuant to the Bureau's standard, would this be accepted or rejected at any time in the North Central Regional institutions today?

A. And, along with my intimate knowledge of what is going on in the institutions in the North Central Region, yes, sir, it would be approved again.

Q. Thus, you feel that this publication does not glorify problem inmates, is that right?

A. I did not make that in-depth study of it. I'm saying that, based on the facts that I have already told you, and a review by my staff, and a letter went out to the Warden saying to clear that publication in; that the climate of those institutions, based on my knowledge that I have

right now, would—if it was approved in then, then it would be approved in now.

Q. So, the climate hasn't changed since you wrote the letter, at least substantially enough to affect your decision?

A. Yes, that's right.

Q. And, am I correct that the publication—Marion originally rejected this publication on the grounds that it glorified prison unions. Since you are [73] saying that you would allow it in, is it your opinion that it does not glorify prison unions?

A. It was the judgment of my staff that at the time that I told Marion that they would permit it in, that it would not.

Q. And, it does not today, as well?

A. If I approved it in—and, I tell you just from my quick review of it—no, I would let it in.

Q. And, at the time that it was rejected from Marion and rejected on the grounds that it glorified problem inmates, do you also agree that it does not glorify problem inmates?

A. I would approve it in to the institution.

Q. And therefore, you disagree with the statement by the committee at Marion that it glorified problem inmates?

A. I already overruled them.

* * * * *

[78] BY MR. NEY: Having marked Exhibit 43, a letter from the Incoming Publications Committee at Marion regarding the *Call Magazine* from March 25th, 1977, and I would ask you to review the *Call Magazine* which is listed as Henderson Exhibit Number 29, dated March 21st, 1977. [79] Tell me whether, applying the Standard for Incoming Publications, you would allow that publication

into Marion today. I will also tell you that, to the best of my knowledge, this was not appealed to the Regional Director's level, so we are operating under the same assumption that we have in previous hypothetical questions.

MR. DUTTERER: In other words, this is another hypothetical, and he makes assumptions about the institution and the current climate today, and he doesn't have in front of him, information from the Warden, but he makes all these assumptions from a hypothetical—

MR. NEY: Well, he has the rejection letter.

MR. DUTTERER: That's two years old.

MR. NEY: Well, he is assuming that he's getting that letter today, as well as the publication.

MR. DUTTERER: But, in these hypotheticals, he's making these assumptions.

MR. NEY: That's right, the letter states the reason for the rejection of that publication today.

A. Yes, I would let it in.

BY MR. NEY: Q. Did you pay attention, by the way, to [80] the article about the control unit at Marion?

A. Yes.

Q. And, I call your attention to a few things in there. One is a statement that, "Beatings by racist guards were a regular occurrence, and three prisoners have been found hanged in their cells in the last three years"—"suicides, according to Marion officials"—

A. You're not asking me to testify to the accuracy?

Q. No, not to the accuracy, but whether this statement, in your opinion, would be detrimental to the security, good order, and running of the institution.

A. With all the assumptions you have added in talking about it right now, I'd say, yes, I would let it in.

Q. So, you would find that not to be detrimental?

A. That's right.

Q. And, I call your attention to the last paragraph of that article which states, "But, officials have not been able to crush prisoner resistance or halt the spread of revolutionary ideas. Besides the lawsuit, Marion inmates have staged strikes and fasts and have continued to struggle against their oppression." Do you find that paragraph, at the present time, detrimental to the good order, security, and discipline of the institution?

A. It wouldn't help it, but I would let the article in.

* * * * *

[148] Q. You mentioned this morning that one article or one page would be a basis of rejecting a book or publication, is that right?

A. That's right.

Q. What is the reason for not deleting or excising the offending portion and giving the inmate the rest of it?

A. We have never modified any piece of property that was coming in to an inmate. And, if someone else wanted to make that alteration, you know, we may consider that. But, from an Administrator's standpoint, my judgment would be—I get sued enough already. And, that would just be another place for a lawsuit, is to damage something that came in, or change it in such a way to change the whole meaning of the article.

Q. Suppose you had the consent of the prisoner to excise that portion. Would that solve the problem?

A. No.

Q. Why not?

[149] A. Because I would probably be sued by the submitter. They can make that alteration.

Q. Whose publication is it if an inmate has subscribed to it? Are you saying it belongs to the publisher?

A. Until it's delivered.

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DEPOSITION OF G. R. McCUNE
ATLANTA, GEORGIA
APRIL 23, 1981

EXAMINATION BY PLAINTIFFS

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[49] BY MR. NEY: Q. * * * Would [*Playgirl* magazine] be acceptable today at all institutions in your region? * * *

[50] THE WITNESS: Well, I would have to answer it with the same provisions, depending upon the circumstances at the time, but, basically, as I quickly thumb through this, I would not allow [51] this in to an all-male institution, again, because of the assumption being a magazine like this would only appeal to homosexuals, and identify them. I do not — if I missed any, I do not know if there are any depictions of female homosexuality. Then, I would not generally allow it in to Lexington, but not into a male institution just because of the nude male photograph.

BY MR. NEY:

Q. Suppose I told you, and it was a fact that this publication has been permitted in all-male institutions within the Bureau of a higher security Level 5, and has not caused any discernible problems. Would that change your opinion?

A. No. If it is coming into this region, I am not aware of it, and if I became aware of it, I would make it clear that it should not come in. We sell some magazines in the commissary, but to my knowledge it is not sold in the commissary in a male institution. If it is, then I will correct that when I get to it. I cannot argue with it. It may come in in some places. I do not know. But the rationale that I am using, and all the Wardens should use, would be to prohibit it in all the male institutions.

* * * * *

[57] Q. Does this refresh your recollection about the publication, or the Book of David Kopay?

A. I do not remember the book, particularly. It has been a long time ago. I can see the rationale about rejecting it, if, in fact, it is a blatantly homosexual book. Then, again, as the Warden explained targeting, identifying —

Q. So you would stand by the rationale you gave at that time?

A. Yes, I would. I made it at that time and I have not changed my feelings about it, but I do not remember the book itself.

* * * * *

[59] Q. So you would exclude it from all institutions in this region on the basis that it is encouraging a prohibited act, and on the basis of identification of homosexuality, if you were the Warden?

A. Yes.

* * * * *

[64] THE WITNESS: Probably the prisoners know more about this than this article [in *The Call*, McCune Exhibit 10], anyway, with the Bono case, so there is some inaccuracy in it.

BY MR. NEY:

Q. What was inaccurate?

A. Of course, they are saying that the prisoner is framed for murder. No, I do not see any big problem [65] with it right now in any institution.

* * * * *

[69] Q. I would like to show you: While There is a Soul in Prison, which has a document number of 927, and I believe it was marked as a Cripe exhibit, but I do not [70] know the number. We will mark that as McCune Exhibit Number 12.

(Thereupon Exhibit Number 12 to the deposition was marked for identification by the Reporter.)

BY MR. NEY:

Q. Again, rather than have you read the publication, which is fairly lengthy, I will have you focus on the page, which is entitled: Non-cooperation. It goes on to the next page. Why don't we just start with that. Based on a quick review, if you could, on just the pictorial matter and the publication.

A. Just the pictures?

Q. The pictures, and that one article.

A. I think the problem that some Wardens would have with it, is that it somewhat encourages resistance, or defiance of authority, but to me the article is fairly non-descript. I would not have any big problem with it, but I am sure that is the way it would have to be looked at in a given institution. I do not have any big problem with it, those pictures. Do you want to me to look at any more pictures?

Q. Yes. That would be a basis for rejection?

A. I do not see any pictures that would cause me any trouble.

[71] Q. If a Warden were to reject this publication based on the parts that you have reviewed, the pictures, and the article because it encouraged prisoner strikes, would you sustain that?

A. I would have to do a little bit more than that. If you had a situation in an institution where things were strange, that could indirectly cause some problems, but under normal circumstances, it is not that descript in terms of encouraging prisoners to strike, at least the article I read, and the pictures, I do not see any connection with that really.

* * * * *

[72] Q. When you say you would not let it in, at the present time into an institution in this region?

A. Right now?

Q. Right now.

A. No. I am not talking about that. I am talking at that time.

Q. What about at the present time?

A. I think it could have somewhat the same impact, but I think it was a very sensitive issue at the time. I think what that does, it distorts the issue that we are, in fact, murdering prisoners. I don't think that is the truth at all. I would not allow it in. It is definitely—I would not allow anything like that at the time it was occurring at Leavenworth.

Q. Your position is not to allow it in for the same reason?

[73] A. Yes, for the same reason.

* * * * *